INDEX

	Page
Opinions below	1
Jurisdiction	2
Question presented	2
Rule involved	2
Statement	3
1. The prior decision of this Court	3
2. The decision of the district court on remand	6
3. The second decision of the court of appeals	6
Reasons for granting the writ	8
Conclusion	14
Appendix A	15
Appendix B	34
Appendix C	36

CITATION

Case:

Minnesota Mining and Manufacturing Co. v. *Platt*, 314 F. 2d 369 4

Platt v. *Minnesota Mining and Manufacturing Co.*, 376 U.S. 240 ..... 2, 3, 4, 5, 6, 8, 9, 13

Rule:

Federal Rules of Criminal Procedure, Rule 21(b) 2, 3, 8, 9, 10

777-703—65——1

In the Supreme Court of the United States

OCTOBER TERM, 1965

No.

THE HONORABLE CASPER PLATT, CHIEF JUDGE, UNITED STATES DISTRICT COURT, EASTERN DISTRICT OF ILLINOIS, PETITIONER

v.

MINNESOTA MINING AND MANUFACTURING COMPANY

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

The Solicitor General, on behalf of the Honorable Casper Platt, Chief Judge, United States District Court for the Eastern District of Illinois, petitions for a writ of certiorari to review the judgment of the Court of Appeals for the Seventh Circuit entered in the above cause on April 20, 1965.

OPINIONS BELOW

The opinion of the district court (App. B, *infra*, pp. 34–35) is unreported. The opinion of the court of appeals (App. A, *infra*, pp. 15–33) has not yet been reported. The district court's first opinion is reproduced in Appendix C, *infra*, pp. 36–46. The first opinion of the court of appeals is reported at 314 F. 2d 369.

JURISDICTION

The judgment of the court of appeals was entered on April 20, 1965. On May 20, 1965, Mr. Justice Clark extended the time for filing a petition for a writ of certiorari to and including June 19, 1965. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED [1]

Whether the issuance of a writ of mandamus by the court of appeals, directing the district judge to transfer this case to the District of Minnesota, was in disregard of this Court's prior decision in this litigation (*Platt* v. *Minnesota Mining Co.*, 376 U.S. 240).

RULE INVOLVED

Rule 21(b) of the Federal Rules of Criminal Procedure provides:

> *Offense Committed in Two or More Districts or Divisions.* The court upon motion of the defendant shall transfer the proceeding as to him to another district or division, if it appears from the indictment or information or from a bill of particulars that the offense was commited in more than one district or division and if the court is satisfied that in the interest of justice the proceeding should be transferred to another district or division in which the commission of the offense is charged.

[1] See note 5, *infra*, p. 8, indicating that, should the Court set the case for plenary consideration, we shall argue that mandamus was an inappropriate method of review in this case.

STATEMENT

The question is whether the court of appeals has acted in disregard of this Court's prior decision in this litigation in *Platt* v. *Minnesota Mining Co.*, 376 U.S. 240.

1. THE PRIOR DECISION OF THIS COURT

This case arises out of an antitrust criminal prosecution against Minnesota Mining and Manufacturing Co., brought in Danville, Illinois, in the Eastern District of Illinois. The company's motion under F.R. Crim. P. 21(b) for transfer to the District of Minnesota was denied by Chief Judge Platt, the district judge, in a detailed opinion considering, as relevant factors urged by the defendant, (1) the location of the defendant and alleged co-conspirators; (2) the location of possible witnesses; (3) the location of events likely to be in issue; (4) the location of documents; (5) the possible disruption of the business of the defendant; (6) the expense to the parties of the competing forums; (7) the location of counsel; (8) the accessibility of the place of trial; (9) docket conditions; and (10) other alleged special elements of hardship (App. C, *infra,* pp. 36–46; R. 8–18). After a full canvass of these matters, the district judge concluded "that 'in the interest of justice' the cause should be tried in the Eastern District of Illinois" (App. C, *infra,* p. 46; R. 18).

Defendant petitioned for a writ of mandamus to the Court of Appeals for the Seventh Circuit. The court held (Chief Judge Hastings dissenting) that, in

denying transfer, the district judge had relied upon an improper factor militating against transfer, namely, the ability to obtain a fair jury trial in Minnesota in light of the fact that Minnesota is the home district of defendant company. The court of appeals granted the writ and directed transfer to Minnesota. *Minnesota Mining and Manufacturing Co.* v. *Platt*, 314 F. 2d 369. In taking this action, the court relied both upon its view of the relative convenience of the competing forums and upon what the court believed to be the defendant's historical right to be tried "in the vicinage of its home office." 314 F. 2d at 372.

This Court granted certiorari and reversed. *Platt* v. *Minnesota Mining Co.*, 376 U.S. 240. Assuming without deciding (1) that, as the court of appeals had held, the district judge erred in considering, among the factors relevant to transfer, the likelihood of obtaining a fair jury in Minnesota and (2) that mandamus would lie in the court of appeals to review this error of the district judge, this Court held that the court of appeals had, nevertheless, been in error in itself directing transfer upon its own appraisal of the competing forums. The Court said (376 U.S. at 244–245; R. 41):[2]

> The District Court's use of an inappropriate factor did not empower the Court of Appeals to order the transfer. The function of the Court of Appeals in this case was to determine the appropriate criteria and then leave their application to the trial judge on remand. Extraordinary writs are "reserved for really ex-

[2] "R. ——" refers to petitioner's printed appendix in the court of appeals.

traordinary causes." *Ex parte Fahey,* 332 U.S. 258, 260 (1947), and then only "to confine an inferior court to a lawful exercise of its prescribed jurisdiction or to compel it to exercise its authority when it is its duty to do so." *Roche* v. *Evaporated Milk Assn.,* 319 U.S. 21, 26 (1943). Here, however, the Court of Appeals undertook a *de novo* examination of the record and itself exercised the discretionary function which the rule commits to the trial judge. This the court should not have done since the writ cannot be used "to actually control the decision of the trial court." *Bankers Life & Casualty Co.* v. *Holland,* 346 U.S. 379, 383 (1953).[3]

This Court ruled further that, contrary to the decision of the court of appeals, there was no "constitutionally based" right of trial at a defendant's home which should have been considered in the decision of the transfer motion: "The fact that Minnesota is the main office or 'home' of the respondent has no independent significance in determining whether transfer to that district would be 'in the interest of justice,' although it may be considered with reference to such factors as the convenience of records, officers, personnel and counsel" (376 U.S. at 245–246; R. 42). The judgment below was reversed and the case remanded to the court of appeals "with instructions to vacate the judgment of the District Court and to re-

[3] Justice Harlan, concurring, stated that the Seventh Circuit's "*de novo* determination of the change of venue motion" after elimination of the improper factor "inescapably contravenes accepted principles governing the exercise of appellate jurisdiction" (376 U.S. at 246; R. 43).

mand the case for reconsideration of the motion for transfer, without reference to the ability of the United States to receive a fair and impartial trial in Minnesota" (376 U.S. at 246; R. 42).

2. THE DECISION OF THE DISTRICT COURT ON REMAND

The court of appeals entered a remand order in compliance with this Court's judgment (R. 44). Thereafter, a hearing was held in the district court and Judge Platt rendered a second decision stating that he had "reconsidered [his] prior opinion omitting therefrom any reference to the obtaining of a fair jury trial in the District of Minnesota" and that, "[a]fter careful consideration of all points made in the prior opinion, this Court is of the opinion that the omission of this one point has no effect upon its decision and comes to the conclusion that the motion to transfer under Rule 21(b) in the interest of justice should be denied" (R. 6). Judge Platt noted that, in his view, "interruption of the business and expense of defendant have been overemphasized" (R. 7).

3. THE SECOND DECISION OF THE COURT OF APPEALS

Defendant once again petitioned the court of appeals for the issuance of a writ of mandamus and, once again, the court issued the writ (Chief Judge Hastings again dissenting) (App. A, *infra,* pp. 15–33). At the outset, the court's opinion noted that, under this Court's opinion, "the fact that Minnesota is the main office of petitioner may be considered with reference to such factors as the convenience of records, officers, personnel and counsel." (App. A, *infra,*

p. 16). The court evaluated these factors, and found that they favored trial in Minnesota because of the additional expense and inconvenience which would be caused defendant by trial in Illinois.[4] The court then explicitly rejected the government's argument, made to Judge Platt, that the size and financial strength of Minnesota Mining was a relevant factor in appraising the adverse impact upon defendant which would result from trial in Illinois rather than in Minnesota. The court noted that Judge Platt had stated that "interruption of the business and expense of defendant have been overemphasized," but stated that "[t]his language indicates something less than a fair consideration of the salient parts of petitioner's case on remand" (App. A, *infra,* p. 23). The court also referred to the factor of "docket condition" appraised by Judge Platt in his original opinion. Judge Platt had stated that the "docket in Danville, without a doubt, would provide a trial at an earlier date than in the Minnesota District" (R. 16). In the view of the court of appeals, however, "[o]f significance in this case is the condition of the docket in the Eastern District of Illinois as compared with the District of Minnesota—not the condition of the docket in only a part of the Eastern District of Illinois, *i.e.,* Danville, as compared with the District of Minnesota. Judge Platt refused to recognize this condition" (App. A, *infra,* pp. 23–24). Thus the court found that factors of expense and convenience to defendant favored transfer while the court correspond-

[4] As Judge Hastings pointed out in dissent, the court's recitation of these factors was "a verbatim copy" of portions of the defendant's brief before it (App. A, *infra,* p. 28).

ingly found no counter-balancing considerations. On this basis the court concluded that the district judge had "abused his discretion as pointed out in this opinion and that therefore he did not comply with the mandate of this court upon remand. He did not reconsider the motion of petitioner to transfer in the light of proper criteria and the interest of justice under federal criminal rule 21(b)" (App. A, *infra,* p. 24). In consequence a "writ of mandamus will issue directing respondent * * * to * * * enter an order transferring said cause to the United States District Court for the District of Minnesota" (App. A, *infra,* p. 25). Chief Judge Hastings' dissent expressed the view that "the majority again, in my judgment, has considered the case *de novo* and made its own determination of the motion to transfer" (App. A, *infra,* pp. 28–29).

REASONS FOR GRANTING THE WRIT

1. This Court's first decision in this case, reversing the first writ of mandamus issued by the court of appeals (*Platt* v. *Minnesota Mining Co.,* 376 U.S. 240, 244–245), made clear the limited scope of appellate review of district court orders refusing transfer under Rule 21(b).[5] The Court held that a court of appeals

[5] In its first decision, the Court assumed, without deciding, that mandamus was "an appropriate means to review the refusal to transfer." 376 U.S. at 244. This assumption was made because the Court found that the government had not challenged the appropriateness of the writ. Should the present petition be granted and the case set for plenary consideration, we wish to preserve the position that mandamus is not an appropriate means of review of transfer orders. As we point out in the text, however, we believe that there is no support

in such cases is limited to determining the propriety of the criteria used by the district court in considering the transfer motion, but that the actual application of those criteria is solely for the district court: "The function of the Court of Appeals in this case was to determine the appropriate criteria and then leave their application to the trial judge on remand." 376 U.S. at 245. The Court explicitly and affirmatively prohibited the exercise by a court of appeals of the ultimate discretionary decision whether or not to transfer a case. In the Court's words, "[h]ere * * * the Court of Appeals undertook a *de novo* examination of the record and itself exercised the discretionary function which the rule commits to the trial judge. This the court should not have done since the writ cannot be used 'to actually control the decision of the trial court.'" (*Ibid.*)

The Court of Appeals for the Seventh Circuit has, for the second time, done the very thing thus prohibited by this Court's earlier decision. Despite this Court's explicit ruling to the contrary, the court of appeals has, once again, "itself exercised the discretionary function which the rule commits to the trial judge" by directing transfer of this case through a writ of mandamus. This blatant disregard of this Court's decision—and of the proper respective roles of the district court and court of appeals under Rule 21(b)—should be reversed and the court's writ directing transfer vacated.

---

on the merits for the court of appeals' order and that it may be reversed without reaching the broader question whether mandamus was appropriate.

2. While the transfer order entered by the court of appeals was thus in clear disregard of this Court's earlier opinion, that opinion did not preclude the possibility that, upon a second review of the district court's decision, the court of appeals might find that the district court had again applied improper criteria in determining the interest of justice under Rule 21(b). If such were the case, a second remand to the district court might be called for. We submit, however, that the district judge used no erroneous criteria upon his second consideration of the transfer motion and that there was thus no occasion in the court of appeals for even this limited review of his decision. Judge Platt's second order denying transfer should, therefore, have been left undisturbed by the court of appeals.

The court of appeals purported to find two improper criteria used by Judge Platt in his second decision. First, the court said that "we cannot agree that it is * * * true (as government counsel successfully argued before Judge Platt) that the financial *strength* of a defendant in such a case is a *reason* for *rejecting* its argument that proof of substantial added expense calls for *transfer*. * * * We believe that the size and power of neither of the parties is relevant in this matter" (App. A, *infra*, pp. 22–23) (emphasis in original). Secondly ,the court found that Judge Platt had been in error in considering only his docket at Danville in the Eastern District of Illinois in appraising the likelihood of a speedy trial as between the Eastern District of Illinois and the District of Minnesota. In the court's view, Judge Platt should, instead, have considered the state of the docket in the

entire Eastern District as against the docket in Minnesota.

The court of appeals was wrong in its judgment regarding both these factors. As to the financial resources of defendant, it seems obvious that, since the hardship to a defendant resulting from the expense of trial at the original forum is a relevant consideration, that factor cannot adequately be weighed without an appraisal of the party's resources and its proved ability (as in this case) to undertake litigation throughout the country. While the financial strength of the defendant is not an affirmative justification for trial in Illinois, it is a relevant factor in determining how great a burden trial in that district would be. It was in that sense that Judge Platt took into account Minnesota Mining's financial strength. As to which docket in the Eastern District of Illinois was the relevant one for determining the likelihood of a quick trial there as compared with Minnesota (a concededly relevant consideration), the record shows (R. 158–159, 198–201) that in Illinois each division of the Eastern District has an independent calendar. Thus Judge Platt correctly held that only matters pending in Danville were relevant to the likely speed of trial should transfer be denied.

3. The court of appeals sought, in part, to support its departure from this Court's explicit prohibition upon appellate exercise of the discretion to transfer by finding that Judge Platt had "abused his discretion" (App. A, *infra*, p. 24). Even if such an imprecise exception to this Court's previous decision were to be newly recognized, this case reveals nothing which can fairly be characterized as "abuse of discre-

tion." Judge Platt's first opinion contained a thorough, detailed and fair canvass of ten factors urged by the defendant as relevant to whether transfer here was dictated "in the interest of justice." In appraising these factors, Judge Platt found, as did the court of appeals, that trial in Minnesota would undoubtedly cause less disruption to defendant's business and less expense to defendant than trial in the Eastern District of Illinois. He also found, however, that some disruption would be caused in any case and, "when consideration is given to the size of defendant's operation, the number of its plants, and their locations, the interruption of defendant's business should not be too great" (R. 13, 14). On the other hand, Judge Platt found that the Eastern District of Illinois would be a more convenient forum than Minnesota for a substantial number of the government's witnesses and that it would be a more convenient forum for the government with regard to documentary evidence already collected in the Eastern District of Illinois (R. 12, 13). The Eastern District of Illinois was found not to be substantially more inaccesible to witnesses and counsel than Minnesota and, "without a doubt," trial could be had at an earlier date in the Eastern District of Illinois than in Minnesota (R. 16). On remand, Judge Platt once again addressed himself directly to the defendant's primary contention—that trial anywhere but in the place of its home office would be unjustly expensive and disruptive—and again held that, in his opinion, "interruption of the business and expense of defendant have been overemphasized" (R. 7). In short, while he recognized the factors in favor

of transfer urged by defendant, Judge Platt determined that, in light of other factors in favor of not disturbing the place of trial as well as the defendant's obvious ability, despite its objections, fairly to present its case in the Eastern District of Illinois without a disproportionate financial or business burden, he was not satisfied, as Rule 21(b) requires, that the interests of justice called for transfer to Minnesota.

The court of appeals' opinion does not suggest that the refusal to transfer this case exposed defendant to unconscionable costs or difficulties or that failure to transfer will interfere in any respect with defendant's ability to obtain a fair trial. At most, the court of appeals has demonstrated that, weighing all the relevant factors, it was possible to find, and the court of appeals would have found, that defendant had met its burden of showing that the interests in favor of transfer preponderated. We have no quarrel with the fact that a decision in favor of transfer could be supported here. But it was precisely this discretionary decision whether the considerations favoring transfer were sufficiently strong which this Court's prior opinion left to the district judge, not the court of appeals. Finally, we note that (as with the allegedly improper criteria used by the district judge) Judge Platt's exercise of discretion on the facts of this case was before this Court on its prior review and it was in this very context that the Court held that the court of appeals was not to exercise "the discretionary function which the rule commits to the trial judge." 376 U.S. at 245.

CONCLUSION

The petition for a writ of certiorari should be granted, the judgment of the court of appeals directing the issuance of a writ of mandamus should be reversed, and the case should be remanded to the United States District Court for the Eastern District of Illinois for trial.

Respectfully submitted.

ARCHIBALD COX,
Solicitor General.

ROBERT L. WRIGHT,
Acting Assistant Attorney General.

PAUL BENDER,
Assistant to the Solicitor General.

LIONEL KESTENBAUM,
Attorney.

JUNE 1965.

APPENDIX A

In the United States Court of Appeals for the Seventh Circuit

No. 14725 September Term, 1964—April Session, 1965

MINNESOTA MINING AND MANUFACTURING COMPANY, A DELAWARE CORPORATION, PETITIONER,

v.

HON. CASPER PLATT, CHIEF JUDGE, UNITED STATES DISTRICT COURT, EASTERN DISTRICT OF ILLINOIS, RESPONDENT

Petition for Writ of Mandamus

April 20, 1965

Before Hastings, *Chief Judge,* and Duffy and Schnackenberg, *Circuit Judges.*

Schnackenberg, Circuit Judge. We now consider a second petition for mandamus filed in this court by Minnesota Mining and Manufacturing Company, a Delaware corporation, for the issuance of a writ of mandamus directed to Chief Judge Casper Platt of the United States District Court for the Eastern District of Illinois, respondent, ordering him to vacate his order of June 30, 1964 which again denied petitioner's motion to transfer the criminal action pending before him entitled *United States* v. *Minnesota Mining and Manufacturing Company,* No. 61–73–D, and ordering him to transfer said cause to the district court for the District of Minnesota, or, in the alternative, directing him either to comply with the man-

777-703—65——3

date of this court or to reconsider the motion in the light of proper criteria of the "interest of justice" under Criminal Rule 21(b).[1]

Following a review of our prior decision, 314 F. 2d 369 (1963), the Supreme Court, 376 U.S. 240 (1964), noted that the government had not challenged our striking of a finding by the district court that it "would be more difficult to get a fair and impartial jury in the Minnesota District than in the Eastern District of Illinois." The Supreme Court noted that Judge Platt represented in his answer that this issue "was but one of a number of factors". It added, at 245, that it was our function "to determine the appropriate criteria and then leave their application to the trial judge on remand," and that extraordinary writs are "to *confine* an inferior court to a *lawful* exercise of its prescribed jurisdiction or to compel it to exercise its authority when it is its duty to do so. *Roche* v. *Evaporated Milk Assn.*, 319 U.S. 21, 26 (1943)." [Italics supplied for emphasis.]

The court said that the fact that Minnesota is the main office of petitioner may be considered with reference to such factors as the convenience of records, officers, personnel and counsel. Therefore, it becomes important that we ascertain whether on remand, the district court *gave consideration to such factors* and whether, in so doing, it exercised its authority law-

[1] 18 U.S.C.A. rule 21(b) provides:

"(b) Offense Committed in Two or More Districts or Divisions. The court upon motion of the defendant shall transfer the proceeding as to him to another district or division, if it appears from the indictment or information or from a bill of particulars that the offense was committed in more than one district or division and if the court is satisfied that in the interest of justice the proceeding should be transferred to another district or division in which the commission of the offense is charged."

fully or abused it. In so doing, we make no findings of facts and make no factual reference except where there is substantial evidence of some fact material to the performance of our functions and the purpose of a writ of mandamus.

The original record, which essentially remained unchanged at the remand hearing, showed and now shows no witnesses on the merits are in the Eastern District of Illinois, no connection (except statutory venue) between that district and the issues created by the indictment, and no significant saving in cost or any other elimination of hardship or augmentation of convenience that could result to anyone from trying the case in Danville. The record as now supplemented shows that of 99 potential government witnesses, none of them lives in the Eastern District of Illinois. Current train and plane schedules again demonstrate the vastly superior accessibility, and therefore convenience, of the Twin Cities of Minnesota, as compared to Danville, for all witnesses. Docket conditions in both districts continue to be current, with the Eastern District of Illinois having a larger average case load per judgeship than does the Minnesota district.[2]

A more complete recital of the foregoing and other relevant facts is appended in footnote.[3]

---

[2] And see third paragraph of note 3, 314 F. 2d 369, 375.

[3] *Location of parties and records.*—Petitioner's operations are centered in St. Paul, Minnesota. Its general and administrative offices, its main research laboratories, and several of its manufacturing plants are located there. Petitioner has no facilities, not even a branch sales office, in the Eastern District of Illinois. All but two of petitioner's 11 directors and 29 corporate officers live in or near St. Paul, Minnesota; none lives in the Eastern District of Illinois. Five present or former employees of the petitioner who have been interviewed by government counsel since the return of the indictment also live

Neither at the original hearing in the district court, nor upon remand, did the government offer any evidence to refute the foregoing facts. Government

---

in St. Paul. Trial counsel on both sides are in Chicago, but petitioner's general counsel and patent counsel, who have served for many years (from 1937 and 1929 respectively), are located in St. Paul. Besides its copies of the 15,000 documents already furnished the government, general corporate files (4,000 file drawers), its operating division files (over 300 drawers), and its patent attorneys' files (84 drawers) are all located in St. Paul. Some of the files used in the normal course of business and the personnel in charge of the files would have to be moved to Danville. Eleven alleged co-conspirator corporations are located on the East Coast or in the Chicago area; of the 29 present or former employees of these eleven companies who have testified before the grand jury or been interviewed by the government counsel in Chicago, 17 are from the East Coast, 5 from Florida or the West Coast, and 7 from the Chicago area, but not one lives in the Eastern District of Illinois.

Events in issue.—Respondent has characterized the indictment as charging "in the main * * * improper use of [petitioner's] patents in coercing competitors to accept patent license agreements * * *." No patent licensee, alleged co-conspirator, or direct competitor is, however, located within the Eastern District of Illinois. Petitioner's executives in charge of the products, patents, patent licenses and negotiations involved in the indictment know of no event relating to these matters which took place, and no prospective witness who lives, in the Eastern District of Illinois. Such events have, on the other hand, taken place in St. Paul on many occasions, and decisions concerning such matters have been made in St. Paul.

Contact between defense counsel and petitioner's executives; disruption of business.—In order adequately to defend against the charges of this indictment, the record shows, it is essential that some of petitioner's principal executives living and working in the Twin Cities area be present at the place of trial throughout the time of final preparation for and actual trial of this case, both because of their knowledge of the product lines and of the patent licenses involved in the indictment and because many of them will be important defense witnesses

counsel took the position that the disruption of business, the inconvenience that would accrue to petitioner through a trial at Danville, and its expense

---

Similarly, the presence of subordinates who have had responsibility in the areas covered by the indictment and who also live in or near St. Paul will be necessary at the trial. General and patent counsel from St. Paul will have to be present before and during the trial, and contact between corporate executives and all counsel will be easier, less expensive, less disruptive of petitioner's business, and more apt to assure defendant adequate representation if the trial is held in St. Paul. Moreover, the removal of personnel and records to Danville necessary to an adequate defense would cause serious disruption of the petitioner's normal business activities at all levels. The respondent specifically found that "there can be little doubt that if the trial occurred in St. Paul there would be less disruption of petitioner's business * * * [and that] * * * during the trial * * * counsel could talk in person with petitioner's officers and employees if the trial were held in St. Paul".

Unjustifiable expense.—The cost to petitioner of trial in Danville instead of St. Paul, as shown in a detailed estimate submitted by affidavit of petitioner's Danville counsel, will exceed $100,000. This estimate is minimal, has never been challenged, and does not include what would of necessity be very substantial expenses that would have to be incurred for transportation, facilities for witnesses, office space for executives and compensation of local counsel. Nor does it take into account the intangible expenses resulting from having executives removed from their normal operating posts, losses of time, reduction in supervision and efficiency, morale and other such factors.

Convenience of witnesses.—Petitioner's affidavits show the locations of all prospective witnesses presently known to it, both of its own witnesses and those who, because they testified before the grand jury or have since been interviewed by the government, are likely to be witnesses for the government at the trial of this cause. The trial judge found that Minnesota would be the "more convenient" forum for witnesses who are officers or employees of the petitioner, most of whom live in the Twin Cities area and none of whom lives in or near the Eastern District of Illinois. As to prospective government witnesses, the government has intro-

should not be considered by the court because of the size of petitioner. The government actually filed a brief in the district court arguing that respondent

---

duced no facts, but no claim is made that any witness on the merits is to be found in the Eastern District of Illinois. The record shows, in fact, the areas in which 99 prospective government witnesses, grand jury witnesses or persons interviewed by government counsel, are domiciled. Fifteen of the 99 reside in the Twin Cities area to which petitioner seeks to have this case transferred. Of the remaining 84, 24 are to be found in the metropolitan New York and New Jersey areas, 12 in upstate New York and New England states, 9 in the Pennsylvania and Ohio region, 14 in metropolitan Chicago, 11 in Florida and mid-South states, 8 in California and other far western states, 1 in Detroit, and 5 in Missouri or Kansas. Not one is in the Eastern District of Illinois.

No direct commercial transportation exists either by air or rail between the Twin Cities area and Danville. Nor is there any direct commercial transportation between Danville and most of the areas where the potential government witnesses are known to be located, such as the East and West Coasts, Florida, etc. Because Chicago is the focal point for all the major air lines, the only practical route to Danville from most parts of the country is through Chicago. Direct flights to St. Paul are available from many parts of the country, but flights to St. Paul are often also routed through Chicago. The record shows that it is much more convenient and expedient to reach the Twin Cities from Chicago than it is to reach Danville.

As a major metropolitan area of the United States, the Twin Cities are served by seven airlines scheduling more than 100 flights daily in the Minneapolis-St. Paul International Airport. There are 34 flights daily between Chicago and St. Paul and 19 flights daily between New York and St. Paul. Flights to and from St. Paul are available throughout the day and night. Danville, on the other hand, is served only by Lake Central which schedules a total of seven flights into Danville per day, four of them from Chicago and none of them from the Twin Cities or from any point farther east than Terre Haute, Indiana. The earliest flight from Chicago in the morning is at 10:05 a.m., getting to Danville at 11:05; the latest flight leaving Danville is at 4:10 p.m.

should "consider the size of defendant * * * in deciding the motion to transfer". In its brief to the district court the government asserted:

> Since the defendant has created the issue concerning the impact of the additional expense of trial in Danville, and since this Court accepted said issue, and the Supreme Court has also accepted it for purposes of this case, it is rather late in the day for this defendant to now claim that your Honor must disregard its size and its income and pretend that this defendant is in the same position as an individual defendant. * * *

The railway situation is comparable. There are eight trains operating daily between Chicago and St. Paul leaving and arriving at regular intervals through the day and evening. Only three trains from Chicago stop in Danville, none of them before 1:00 p.m. Of the three trains leaving from Danville to Chicago, two would be extremely inconvenient as they leave in the middle of the night or early in the morning; the other leaves at five o'clcok which might prove difficult for anyone having to stay to the end of the trial day. Overall, the schedules are such that a witness or other interested person leaving Chicago by plane at 8:00 a.m. can arrive in St. Paul at 9:05 a.m., in time to attend a morning court session; whereas, whether he chose to travel by plane or train, he would have to leave Chicago the night before in order to be in Danville in time for the opening of court the next morning.

Docket conditions.—The dockets of the District Court of Minnesota are current now, as they were at the time of the original decision on transfer. As of April 30, 1964, the average case load per judge in Minnesota was 190.25 cases as compared with 213 in the Eastern District of Illinois.

The certificate filed by respondent reveals that the federal district judges not regularly sitting in the Eastern District of Illinois have been sitting there by special assignment and states that with their help the docket in Danville is current, but no reference is made to the East St. Louis docket, a part of the Eastern District where another judge presides.

The government also submitted that the court—

> "* * * should consider the great size and financial strength of defendant Minnesota Mining and Manufacturing Company in evaluating the impact of any added expense resulting from trial in Danville."

We find no basis for adding the size of petitioner to the criteria which were clearly approved by the Supreme Court when it remanded this case. We recognize that there are cases holding that financial *weakness* of a defendant in a case brought in a jurisdiction other than its home location *justifies a transfer* to the home district, as admitted by government counsel herein. However, we cannot agree that it is conversely true (as government counsel successfully argued before Judge Platt) that the financial *strength* of a defendant in such a case is a *reason* for *rejecting* its argument that proof of substantial added expense calls for *transfer*.

The burden of the government's argument is that petitioner is a "giant corporation" and, regardless of how a trial on the merits might end following a large expenditure by petitioner in its defense, it must still foot the bill.[4] Thus, even if petitioner should win a verdict and a judgment on a trial at Danville, it would be penalized the additional costs (assumed by the government to be $100,000), most of which it would have no right to recover. This strange outcome would be

[4] Government counsel informed Judge Platt:

"* * * It may cost $100,000 more to try the case in Danville than at St. Paul for this company, but if that $100,000 expense is one, which is to be absorbed by a small corporation it may be a tremendous hardship, sufficiently so to warrant this court's deciding that it would be not in the interests of justice to require it. On the other hand, in Minnesota Mining I suggest the situation is different. * * *"

justified by government counsel solely upon the theory that the "situation is different."

On remand, Judge Platt's treatment of this situation was limited to the expression of an equivocal opinion that "interruption of the business and expense of defendant have been overemphasized". This language indicates something less than a fair consideration of salient parts of petitioner's case on remand. We feel, however, that these were important criteria and it was the judge's duty to consider them. He could not ignore or insufficiently weigh or consider them even if he thought they were overemphasized.

We feel it proper to add that, in the consideration of this case, the element of size, if permissible as applied to petitioner, should also have been considered as to its adversary, the government, with its well-known overwhelmingly superior size. We really have here a David and Goliath contest. "David" maintains that it has proved by proper criteria, that, in the interest of justice, the case should be transferred to Minnesota. "Goliath" seeks to prevent that transfer. We believe that the size and power of neither of the parties is relevant in this matter.

As to the docket conditions in Minnesota and the Eastern District of Illinois, on remand the district court did not disagree in any way with our statement in footnote 3 of our prior opinion (314 F. 2d 369, 375) that "* * * a division of the cases pending in the Eastern District of Illinois between the two judges of that district would reveal a considerable case load for both of them." Instead he considered a certificate by the clerk of his court which however was limited to cases pending in Danville to the exclusion of those pending in other parts of the same district. Of significance in this case is the condition of the docket in the Eastern District of Illinois as compared with the

District of Minnesota—not the condition of the docket in only a part of the Eastern District of Illinois, *i.e.* Danville, as compared with the District of Minnesota. Judge Platt refused to recognize this condition.

Judge Platt, in his answer to the rule to show cause filed herein, has submitted a brief the last argument of which sums up his position "that the appropriate disposition of the matter was charted by Judge Finnegan * * * in dissent" in *Chicago R.I. & P.R.R.* v. *Igoe* (1955), 220 F. 2d 299, in which the Supreme Court denied certiorari, 350 U.S. 822. Obviously the dissenting opinion was not correct.

We now hold that Judge Platt, on remand, instead of exercising his prescribed jurisdiction and authority, pursuant to the criteria determined by this court and authorized by the Supreme Court, abused his discretion as pointed out in this opinion and that therefore he did not comply with the mandate of this court upon remand. He did not reconsider the motion of petitioner to transfer in the light of proper criteria and the interest of justice under federal criminal rule 21(b).

In his brief before us, respondent squarely takes the position that mandamus cannot be used to control his decision on a rule 21(b) motion, as asked by petitioner, although he assumes the validity of the extraordinary writ of mandamus as an appropriate means of reviewing his decision on a transfer motion under said rule. He argues that he had discretion in passing on the transfer motion. This he did have. However, this court has the right to determine whether he abused that discretion. This case is one in which the correction of that abuse would serve to give effect to rule 21(b) and is particularly appropriate for the exercise of mandamus. In *La Buy* v.

Howes Leather Co., 352 U.S. 249, 256, Justice Clark said:

> * * * As this Court pointed out in *Los Angeles Brush Corp.* v. *James*, 272 U.S. 701, 706 (1927): "* * * [W]here the subject concerns the enforcement of the * * * [r]ules which by law it is the duty of this Court to formulate and put in force," mandamus should issue to prevent such action thereunder so *palpably improper as to place it beyond the scope of the rule invoked.* As was said there at page 707, were the Court "* * * to find that the rules have been practically nullified by a district judge * * * it would not hesitate to restrain [him] * * *" [Italics supplied.]

and at 257, the court added:

> It is also contended that the Seventh Circuit has erroneously construed the All Writs Act as "conferring on it a 'roving commission' to supervise interlocutory orders of the District Courts in advance of final decision." Our examination of its opinions in this regard leads us to the conclusion that the Court of Appeals has exercised commendable self-restraint. * * *

A writ of mandamus will issue directing respondent (1) to vacate and set aside the order entered by him on June 30, 1964 in case 61–73-D, entitled *United States* v. *Minnesota Mining and Manufacturing Company*, and (2) enter an order transferring said cause to the United States District Court for the District of Minnesota. *Chicago R.I. & P.R.R.* v. *Igoe*, 220 F. 2d 299 (1955).

Writ of Mandamus to Issue.

HASTINGS, *Chief Judge*, dissenting.

With due deference, I feel compelled to again dissent in this case from the action taken by my two distinguished colleagues on this court.

This case was first before us on a petition for writ of mandamus directed to Chief Judge Casper Platt of the United States District Court for the Eastern District of Illinois. The writ was ordered issued by a divided court on February 27, 1963, as reported in 314 F. 2d 369.

In my dissent to that decision, I agreed with the majority that the district court, in passing on petitioner's motion to transfer the case to the District of Minnesota, under Rule 21(b), Federal Rules of Criminal Procedure, 18 U.S.C.A., should not consider whether "it would be more difficult to get a fair and impartial jury in the Minnesota District than in the Eastern District of Illinois."

Otherwise, I felt the majority erred in the other aspects of its decision.

The Supreme Court, by unanimous vote, reversed and remanded the cause to our court "with instructions to vacate the judgment of the District Court and to remand the case for reconsideration of the motion for transfer, without reference to the ability of the United States to receive a fair and impartial trial in Minnesota." *Platt* v. *Minnesota Mining Co.*, 376 U.S. 240, 246 (1964). Mr. Justice Harlan concurred in a separate opinion.

In reversing our court, the Supreme Court, speaking through Mr. Justice Clark, said:

> The function of the Court of Appeals in this case was to determine the appropriate criteria and then leave their application to the trial judge on remand. Extraordinary writs are "reserved for really extraordinary causes," *Ex parte Fahey*, 332 U.S. 258, 260 (1947), and then only "to confine an inferior court to a lawful exercise of its prescribed jurisdiction or to compel it to exercise its authority when it is its duty to do so." *Roche* v. *Evaporated*

Milk Assn., 319 U.S. 21, 26 (1943). Here, however, the Court of Appeals undertook a *de novo* examination of the record and itself exercised the discretionary function which the rule commits to the trial judge. This the court should not have done since the writ cannot be used "to actually control the decision of the trial court." *Bankers Life & Casualty Co.* v. *Holland*, 346 U.S. 379, 383 (1963). *Id.* at 245.

The Supreme Court further said:

> Since the trial court must reconsider the motion, effective judicial administration requires that we comment upon the erroneous holding of the Court of Appeals that criminal defendants have a constitutionally based right to a trial in their home districts. * * * The fact that Minnesota is the main office or "home" of the respondent has no independent significance in determining whether transfer to that district would be "in the interest of justice," although it may be considered with reference to such factors as the convenience of records, officers, personnel and counsel. *Id.* at 245–46.

The Supreme Court observed that the Government has not "challenged the use of the extraordinary writ of mandamus as an appropriate means to review the refusal to transfer" and for that reason did not consider that question or express any opinion thereon. *Id.* at 244.

Mr. Justice Harlan stated that while the action of the majority in our court reflected a strong view that the transfer should be granted, yet "such action cannot well be regarded as other than a *de novo* determination of the change of venue motion on the part of the Court of Appeals. Such a course inescapably contravenes accepted principles governing the exercise of appellate jurisdiction." *Id.* at 246.

In due course, the matter was remanded to the district court, as directed by the Supreme Court.

Judge Platt held a further hearing on the petition to transfer on May 28, 1964 and on June 30, 1964 again denied the transfer to the District of Minnesota, because he "was not satisfied that petitioner had established that the 'interest of justice' would be promoted by the requested transfer."

Minnesota Mining and Manufacturing Company again filed in this court a petition for a writ of mandamus directing the transfer to the District of Minnesota. The same panel of three judges of our court which heard the prior mandamus petition was designated to rehear this second one. A majority voted to issue a Rule to Show Cause directing Judge Platt to answer the petition for writ of mandamus.

I voted to deny the issuance of the rule and further to dismiss the petition.

Thereafter, Judge Platt filed his answer to the rule. In the interest of clarity, I have appended Judge Platt's answer as an Appendix to this dissent.

The matter came on for oral argument before the assigned panel of three judges. Again, I am compelled to dissent from the majority holding that the writ of mandamus will issue directing Judge Platt "(1) to vacate and set aside the order entered by him on June 30, 1964 * * * and (2) enter an order transferring said cause to the United States District Court for the District of Minnesota. * * *"

I dissent for the following reasons:

(1) In my judgment, as shown in his answer to the Rule to Show Cause and in his order under review, Judge Platt has fully complied with the decision of the Supreme Court, 376 U.S. 240, and with our order on remand. He did not in any sense abuse the discretion vested in him. He did reconsider the motion to transfer in the light of proper criteria.

(2) I read the majority opinion as being in conflict with the decision of the Supreme Court, in that the

majority again, in my judgment, has considered the case *de novo* and made its own determination of the motion to transfer.

(3) The "other relevant facts" appended in footnote (3) of the opinion are a verbatim copy of a part of petitioner's brief filed in this appeal (except for record references, substitution of "petitioner" for "defendant," and a few minor deletions), beginning on page 5 and ending on page 10, and except for a portion of the final sentence in the footnote. Thus, the majority opinion not only makes *de novo* findings but accepts them as found by petitioner in its brief.

(4) The majority opinion improperly orders the case transferred to the District of Minnesota. In my judgment, we have no authority to enter such an order as an appellant tribunal. If I read the decision of the Supreme Court correctly, it held this was not our function.

(5) Finally, I think the majority erred in entertaining this petition for an extraordinary writ and issuing a Rule to Show Cause. It appears to me that a second interlocutory review of a discretionary order in this case is unwise and unsound judicial administration. In light of the experience of this court in recent months, I adhere to the view that repetitive invocations of mandamus are improperly becoming a way of appelate life.

Judge Platt entered his first order denying the requested transfer on August 31, 1962. It now appears that the forum in which this important criminal case will be tried may not even be determined until almost three years after the change was first requested. This is not to speculate on when it may finally come to trial.

As noted in my prior dissent, 314 F. 2d at 378, my Brother Castle expressed somewhat similar views in his dissent in *Chesapeake & Ohio Railway Company*

v. *Parsons,* 7 Cir., 307 F. 2d 924, 926–28 (1962). Certiorari in that case had been granted. Subsequently, this decision was reversed by the Supreme Court. *Parsons* v. *Chesapeake & O. R. Co.,* 375 U.S. 71 (1963), and thereby another mandamus proceeding went awry.

As Mr. Justice Clark said, *supra,* "Extraordinary writs are 'reserved for really extraordinary causes,' * * * and then only 'to confine an inferior court to a lawful exercise of its prescribed jurisdiction or to compel it to exercise its authority when it is its duty to do so.' " 376 U.S. at 245. I do not think this is such an "extraordinary cause." I do think this is a good case in which we might properly limit what I believe to be a misuse of this extraordinary writ.

I would deny the petition for a writ of mandamus and order it dismissed.

APPENDIX

In the United States Court of Appeals for the Seventh Circuit

No. 14725

MINNESOTA MINING AND MANUFACTURING COMPANY, PETITIONER

v.

THE HONORABLE CASPER PLATT, CHIEF JUDGE, UNITED STATES DISTRICT COURT, EASTERN DISTRICT OF ILLINOIS, RESPONDENT

On Petition for a Writ of Mandamus

I, Casper Platt, Chief Judge of the United States District Court for the Eastern District of Illinois, answer the rule to show cause issued by this Court as follows:

My order of June 30, 1964, in the case of *United States* v. *Minnesota Mining & Mfg. Co.*, Criminal Action No. 61–73–D, was made after a hearing held on May 28, 1964, for the purpose of determining whether the case should be transferred to the District of Minnesota upon motion of the defendant (petitioner) under Rule 21(b) of the Federal Rules of Criminal Procedure. After examining all the relevant factors and considering the arguments of counsel, I was not satisfied that petitioner had established that the "interest of justice" would be promoted by the requested transfer and therefore denied petitioner's motion.

In reaching that result I considered the various opinions on the previous transfer motion in this case, *i.e.*, the opinion of the Supreme Court dated March 9, 1964; the opinion of this Court dated February 27, 1963; and my memorandum opinion and order of August 31, 1962. I also reconsidered the record developed on the previous transfer motion, including the affidavits introduced by both sides. In addition, I considered the supplemental affidavits introduced at the proceeding on the instant transfer motion.

As ordered by the mandate of this Court dated April 21, 1964, I gave no weight to the ability of the United States to receive a fair and impartial trial in Minnesota.

The reasons why I denied transfer have already been spelled out in my answer to the previous rule to show cause. I reiterate and reincorporate those reasons into this answer (except for the fair trial point which I ignored in deciding the present motion): I gave consideration to all factors urged by petitioner and found several which militated against transfer. It appeared to me that the trial of the case would be delayed at least a year by the transfer, and the Government avowed a speedy trial was essential because some of the petitioner's competitors are in financial straits owing to petitioner's alleged conduct and to the fact that petitioner has refused to halt its allegedly illegal activities; that the Government's witnesses may be inconvenienced if forced to travel to

the northern city of St. Paul, Minnesota; that the Government's documents are already in Danville in the custody of the Clerk of the Court and would have to be transported to St. Paul; and that transfer would increase the Government's expense because its witness fees would be greater, as would the cost of transportation of the Government's staff. It further appeared to me that petitioner has operated on a nationwide scale in its business of licensing and selling in the industries here involved; that there is support for the Government's avowal that petitioner's overt acts have substanitally affected the residents of the Eastern District of Illinois; that this is not an "imported" case; and that, considering the evidence and facts in the overall, trial in the Eastern District of Illinois would be in the "interest of justice."

While petitioner would suffer some additional inconvenience and hardship, it does not appear to me that its every assertion must be taken at face value, since not all of its executives need be in Danville at one time; communication via long distance telephone will eliminate much travel; the bulk of the documents necessary for the trial relates to events no longer current so their absence from St. Paul will not disrupt everyday business operations; copies of many of the Government's documents are located in the office of petitioner's counsel in Chicago and must be moved in any event; petitioner's private planes can carry its executives and documents from St. Paul to Danville in three hours; Mr. McKnight can obtain adequate medical attention in Danville; and at one time petitioner was willing to assume all such inconvenience and expense in order to have the trial in Chicago.

Petitioner has not introduced any additional evidence, in its supplemental affidavits, sufficient to satisfy me that the "interest of justice" required transfer. Data as of April 1, 1964 (from the Government's supplemental affidavit of Howard L. Fink), indicates that my criminal docket is still more current than those of the Judges in Minnesota and the case can therefore come to trial earlier in the Eastern District of Illinois.

For the foregoing reasons and those set forth in the attached brief, I respectfully submit that the petition for a writ of mandamus should be denied and that the rule to show cause should be discharged.

CASPER PLATT,
Chief Judge,
United States District Court,
Eastern District of Illinois.

SEPTEMBER 1964.

A true Copy:
Teste:
Clerk of the United States Court of Appeals for the Seventh Circuit.

APPENDIX B

In The United States District Court for the Eastern District of Illinois

Criminal No. 61–73D

UNITED STATES OF AMERICA, PLAINTIFF

v.

MINNESOTA MINING AND MANUFACTURING COMPANY, DEFENDANT

ORDER

In accordance with the Mandate of the Court of Appeals for the Seventh Circuit this Court has reconsidered its prior opinion omitting therefrom any reference to the obtaining of a fair jury trial in the District of Minnesota.

After careful consideration of all points made in the prior opinion, this Court is of the opinion that the omission of this one point has no effect upon its decision and comes to the conclusion that the motion to transfer under Rule 21(b) in the interest of justice should be denied.

The defendant and the Government have both filed supplementary affidavits. The defendant insists that because the Government has failed to disclose the names and addresses of its witnesses within a 300 mile radius of Danville that this Court should ignore the Government's affidavit. This Court does not agree with this contention. Counsel for defendant admits that the Government is not required to disclose the names and addresses of these witnesses, nor can it be

required to so do by the Court. Therefore, due credence should be given to the affidavit of the Government's counsel.

Counsel for defendant insists that the Court give great weight to the convenience of trying the case in the home district. The Supreme Court did say that the convenience and expense of trying it in the home location should be considered. However, if the weight is given to the location of the defendant in the manner in which counsel for defendant insists the Court would then be required in each instance to transfer the case to the home district of a defendant. This Court is of the opinion that interruption of the business and expense of defendant have been overemphasized.

The transfer of this case is not from San Francisco to Chicago but only from Danville, Illinois, to the District of Minnesota, which is only a distance of 550 miles by automobile. The defendant has employed an attorney from Chicago, Illinois, as well as has the Government.

Counsel for defendant also fails to mention in the use of air travel the time consumed in going from the airport to the city and from the city to the airport, nor is mention made of the additional expense of air travel.

Considering the supplemental affidavits filed herein the Court still comes to the same conclusion that the motion to transfer to the District of Minnesota in the interest of justice should be denied, and it is denied. Defendant is granted twenty (20) days to plead to the indictment herein.

Entered this 30th day of June, 1964.

CASPER PLATT,
United States District Judge.

APPENDIX C

In the United States District Court for the Eastern District of Illinois

Criminal Action No. 61–73–D

UNITED STATES OF AMERICA

v.

MINNESOTA MINING AND MANUFACTURING COMPANY, DEFENDANT

(Entered August 31, 1962)

MEMORANDUM AND ORDER

The defendant presents a motion in accordance with Rule 21(b), Fed. Rules Crim. Proc., 18 U.S.C.A., for the transfer of this case to the United States District Court for the District of Minnesota. Defendant's counsel, in their brief and argument, stress transfer to St. Paul, Third Division. (28 U.S.C.A. § 103(3)). The defendant has filed affidavits in support of its motion and the Government has filed affidavits in opposition thereto. Both the Government's counsel and defendant's counsel have filed briefs and argued their position orally, ably, and at great length.

The Government has stipulated that the offense charged in the indictment "was committed" in the Eastern District of Illinois, the District of Minnesota, and the Northern District of Illinois. Therefore, Rule 21(b) is appropriate as a basis for the motion in this case.

Under Rule 21(b) it is necessary in the determination of the motion to transfer that the Court determine from the facts and circumstances whether it is satisfied "that in the interest of justice the proceedings should be transferred." Once a court is satisfied that it would be "in the interest of justice" to transfer under Rule 21(b) it becomes obligatory upon the court to enter an order of transfer.

The term "in the interest of justice" is broad in its meaning. It requires an examination of many factors as criteria in determining the defendant's motion. The defendant in its brief sets out these factors as follows:

1. Location of corporate defendant.
2. Location of possible witnesses.
3. Location of events likely to be in issue.
4. Location of documents and records likely to be involved.
5. Disruption of defendant's business unless the case is transferred.
6. Expense to the parties.
7. Location of counsel.
8. Relative accessibility of place of trial.
9. Docket condition of each district or division involved.
10. Any other special elements which might affect the transfer.

A review of these factors should determine whether the case should be transferred. See *United States* v. *National City Lines*, D.C.S.D. Cal., 1947, 7 F.R.D. 393. The Court will discuss each factor, taking into consideration the facts set out in the affidavits, briefs, and oral argument. Furthermore, the Court will at all times keep in mind that the defendant is to be considered innocent of the charge in the indictment.

The indictment in this case charges the defendant, in nine counts, with violations of §§ 1 and 2 of the

Sherman Act, 15 U.S.C., by the unlawful manipulation or misuse of patents. The first three counts set the pattern for counts four, five, six, and seven, eight, and nine. The first three counts are concerned with pressure sensitive tapes. Count one charges the defendant and others with an attempt to monopolize the flow of pressure sensitive tapes in the United States and in foreign countries. Count two charges the defendant with conspiracy in restraint of trade or commerce among the several states etc. 15 U.S.C. § 1. Count three charges the defendant with conspiracy to monopolize trade or commerce among the several states etc. 15 U.S.C. § 2. Counts four, five and six are similar, but the charges are in regard to magnetic recording media. Counts seven, eight, and nine refer to aluminum presensitized lithographic plates.

LOCATION OF DEFENDANT AND CO-CONSPIRATORS

The defendant is a corporation, organized under the laws of Delaware, and has its principal place of business in St. Paul, Minnesota. It has been located there since about 1911. Its main research laboratory and several manufacturing plants are all in and about St. Paul; thirty-three plants and twenty branch sales offices are located outside Minnesota.

The co-conspirators named in the indictment, with their location, are as follows:

Johnson & Johnson; New Brunswick, New Jersey.
Permacel-LePage's, Inc.; New Brunswick, New Jersey.
Permacel Tape Corporation; New Brunswick, New Jersey.
Industrial Tape Corporation; New Brunswick, New Jersey.
The Revolite Corporation; New Brunswick, New Jersey.

The Kendall Company; Boston, Massachusetts.
Norton Company; Worcester, Massachusetts.
The Seamless Rubber Company; New Haven, Connecticut.
Johns-Manville Corporation; New York, N.Y.
A. B. Dick Company; Niles, Illinois.
Armour Research Foundation of Illinois Institute of Technology; Chicago, Illinois.

POSSIBLE WITNESSES

Defendant states "twenty-four former or present employees of alleged co-conspirators testified before the grand jury or were interrogated informally by government counsel in Chicago. Of these, at least eleven reside in New Jersey or New York within reasonable proximity to the New York metropolitan area, four are from Massachusetts, four are from the Chicago area, and two or three spend their time between Florida or Arizona and the Eastern seaboard." The location and number of other witnesses before the grand jury, excepting 3M personnel, are as follows:

St. Paul, Minnesota (1)
Chicago, Illinois area (2)
New York City area (8)
Boston, Massachusetts (2)
Philadelphia, Pennsylvania (1)
Reading, Pennsylvania (1)
Kansas City, Missouri (1)
San Francisco, California (1)
Los Angeles, California (1)
Miami, Florida (1)

The Government, through its attorney, Mr. Earl Jenkinson, states in his affidavit that "while [he] will not reveal their home locations, he will state that a substantial number of the government's witnesses live within a 300 mile radius of Danville, Illinois, whereas only one or two of its presently contemplated wit-

nesses live within a 300 mile radius of St. Paul-Minneapolis, and they are minor witnesses. Danville is substantially closer and more convenient for the majority of the key government witnesses." Thus, it appears that those witnesses who are officers or employees of the defendant will find it more convenient if the case was transferred to Minneapolis-St. Paul, but as to other witnesses the question of convenience is not so easily determined.

LOCATION OF EVENTS LIKELY TO BE IN ISSUE

In the main the indictment charges the defendant with improper use of its patents in coercing competitors to accept patent license agreements on illegal terms by suing or threatening to sue for infringement. The Government states one of these patent infringement suits was tried in this District at East St. Louis, and that others occurred in various parts of the United States. The defendant insists that it was an involuntary party plaintiff in the East St. Louis action. The defendant states that more activities by the defendant in relation to patents occurred in the District of Minnesota, where its patent attorneys are located, than in the Eastern District of Illinois. It is difficult for this Court to determine without the disclosure of evidence by both Government and defendant where the greater number of these negotiations took place. The defendant contends that venue on all counts does not exist in the Eastern District of Illinois. The indictment alleges venue in the Eastern District of Illinois. The defendant would not suffer if the Government would fail to prove venue, because the indictment or counts in the indictment so affected would have to be dismissed.

DOCUMENTS

The Government now has nine large heavy corrugated boxes, 24 inches long, 15 inches wide, and 13 inches deep containing documents relative to this cause in the Clerk's office in Danville, Illinois. Over 15,000 of these documents were obtained from the defendant. The other documents which the defendant might use at the trial are located in St. Paul. It would be an inconvenience for the defendant to locate and transport the necessary documents which it might use at the trial to Danville. On the other hand, the Government would be required to transport its documents to Minneapolis-St. Paul. No claim is made that the documents which the defendant might use will be indispensable to defendant's day to day operation of its business.

DISRUPTION OF BUSINESS OF DEFENDANT

There can be little doubt that if the trial occurred in St. Paul there would be less disruption of defendant's business. Consultation preparatory for trial between defendant's officers and employees and counsel could be conducted at St. Paul, wherever the trial occurred. Consultation during the trial could be conducted by telephone whether the cause was tried in St. Paul or Danville. Naturally, counsel could talk in person with defendant's officers and employees if the trial were held in St. Paul. The trial will take considerable time wherever the case is tried and it will require some of defendant's officers and employees to take time from defendant's business, but when consideration is given to the size of defendant's operation, the number of its plants, and their locations, the interruption of defendant's business should not be too great.

EXPENSES TO PARTIES

If the trial were held in the Eastern District of Illinois rather than in St. Paul, the home District of the defendant, it would be more expensive to the defendant. The defendant would be required to hire local counsel if the case were tried in Danville, but could use its local general counsel in St. Paul. In St. Paul, defendant states, office space for defendant's attorneys could be easily supplied without cost, but not in Danville. The witness fees to be paid by the Government would be less in total amount if the case were tried in Danville, for the reason that Danville is more centrally located than St. Paul. The expense to the defendant for transporting its officers and employees as witnesses would be a lesser amount if the cause were tried in St. Paul. The Government contends that it will not be required to rent office space in Danville because the United States District Attorney for the Eastern District of Illinois has office space available. Possibly the United States District Attorney in St. Paul would make space available to counsel for the Government.

LOCATION OF COUNSEL

The Government attorneys are located in Chicago, and Mr. Chadwell and Mr. McGee, who have appeared for the defendant in this case, are located in Chicago. The defendant's legal department and its retained patent lawyers are located in St. Paul. Danville can be easily reached from Chicago, Illinois, by automobile, air, or train.

ACCESSIBILITY OF PLACE OF TRIAL

Defendant maintains that St. Paul is more accessible for all the witnesses and attorneys. There are direct air flights from New York to Minneapolis-St. Paul, and this might accommodate the witnesses from Metropolitan New York. This distance to Minneapolis-St. Paul would be greater than if the witnesses traveled from the New York area to Chicago, and then to Danville. There are more rail and air connections between Chicago and St. Paul than between Danville and Chicago. Danville has an airport which will accommodate most all piston planes. It has a schedule of flights from Chicago to Danville and return as follows:

Chicago to Danville 10:25 a.m., arrive 11:29 a.m.
Chicago to Danville 3:15 p.m., arrive 4:51 p.m.
Chicago to Danville 6:30 p.m., arrive 7:34 p.m.
Danville to Chicago 7:53 a.m., arrive 8:55 a.m.
Danville to Chicago 11:24 a.m., arrive 12:24 p.m.
Danville to Chicago 4:48 p.m., arrive 5:50 p.m.

The train service from Chicago to Danville and return is as follows:

Chicago & Eastern Illinois Railroad—
Lv. Chicago 3:45 p.m., arrive 5:54 p.m.
Lv. Chicago 8:00 p.m., arrive 10:20 p.m.
Lv. Chicago 10:45 p.m., arrive 12:56 a.m.
Lv. Danville 7:00 a.m., arrive 9:05 a.m.
Lv. Danville 5:00 p.m., arrive 7:50 p.m.

Air travel is on Daylight and Eastern Time and train travel is on Standard Time.

Danville is also 86 miles from Indianapolis, Indiana, and about 60 miles from Terre Haute. Plane, bus, or train connections could be made from Terre Haute to Danville, and plane and bus connections from Indianapolis.

The Wabash Railroad Company has two trains a day into Danville from St. Louis, Missouri, and two from Detroit, Michigan.

There are also excellent hardroads in all directions to Danville and especially from Chicago. With the excellent roads between St. Paul and Danville, without entering the heavy traffic in Chicago, the trip can be made by automobile in about twelve hours. This Court has driven this route in twelve successive hours.

Witnesses are usually interviewed by counsel before they take the witness stand. Witnesses could easily arrive in Danville the night before they were to be used, thus, giving counsel an opportunity to interview the witness before the witness is used.

The defendant also operates its own planes. These could be used for transportation of counsel, officers, and employees of the defendant, as well as for the purpose of transporting necessary documents. It probably would not take more than three hours to fly from St. Paul to Danville, a distance of approximately 500 miles.

DOCKET CONDITION

The docket in Danville, without a doubt, would provide a trial at an earlier date than in the Minnesota District. At the present time there are but two criminal trials pending on the Danville docket, and these are set for trial September 19 and 20.

SPECIAL ELEMENTS OF HARDSHIP

From the affidavit of Mr. William L. McKnight, Chairman of the Board of defendant, it appears he is the gentleman who is mainly responsible for the phenomenal growth of 3M. No doubt he is a most capable and fine gentleman. His physical condition, unfortunately, may be somewhat taxed by his attendance at the trial whether the trial occurs in St. Paul or Danville. The newspaper clippings displaying photographs, exhibited to the Court by Government's counsel, show that Mr. McKnight was able to attend a dance and to look after his racing stable last February. He had a serious operation in March, 1961 but apparently has recovered and is now in substantially good health. While this Court feels most kindly toward a man of Mr. McKnight's age, it is this Court's opinion that he could make himself most comfortable in one or the other of Danville's hotels, or at the new Holiday Inn Motel which will soon be ready for occupancy, and is only one block from the federal buildings.

There is one other item which cannot be overlooked in passing upon this motion. For more than 50 years 3M has had many employees and stockholders in the St. Paul area. 3M has grown from a small corporation to an industrial giant while located in the St. Paul area. Its officers and employees have been active in civic affairs. They hold official positions in over thirty-three financial, civic, and educational institutions. All of these activities are to the credit of 3M, but at the same time when one considers the number of contacts that its employees and stockholders have made over the area, and the pride that the community in that area would have, and should have, in 3M, there might exist a very severe influence on

any citizen in the area called for jury service. It also must be noted that the charge in the indictment is a misdemeanor, and that the Government and the defendant each have but three peremptory challenges. Rule 24(b), Federal Rules of Criminal Procedure, 18 U.S.C.A. Counsel for the defendant, in his argument, has made the suggestion that the jury might be drawn from outside the counties of Ramsey and Hennepin where there isn't the concentration of officers, employees, and stockholders of 3M. The influence of 3M and its personnel would probably make itself felt among the citizens in the counties adjacent to Ramsey County where St. Paul is located and to Hennepin County where Minneapolis is located. These facts are material in determining where the cause should be tried. See *United States* v. *Hoffa,* D.C.S.D. Fla., 1962, 205 F. Supp. 710, 722. It would be more difficult to get a fair and impartial jury in the Minnesota District than in the Eastern District of Illinois.

This Court has carefully reviewed the facts and circumstances relating to the transfer of this case "in the interest of justice." Some facts mentioned by counsel have not been noted in order not to lengthen this memorandum. The Court has concluded that "in the interest of justice" the cause should be tried in the Eastern District of Illinois.

Therefore, the motion to transfer is denied. IT IS SO ORDERED.

Entered this 31st day of August, 1962.

/s/ CASPER PLATT,
United States District Judge.

U.S. GOVERNMENT PRINTING OFFICE: 1963

LIBRARY
SUPREME COURT, U.S.

Office-Supreme Court, U.S.
FILED
SEP 18 1965
JOHN F. DAVIS, CLERK

No. 274

In the Supreme Court of the United States

OCTOBER TERM, 1965

THE HONORABLE CASPER PLATT, CHIEF JUDGE, UNITED STATES DISTRICT COURT, EASTERN DISTRICT OF ILLINOIS,
Petitioner,

v.

MINNESOTA MINING AND MANUFACTURING COMPANY,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

BRIEF OF MINNESOTA MINING AND MANUFACTURING COMPANY IN OPPOSITION

JOHN T. CHADWELL
GLENN W. McGEE
ALLAN J. RENICHE
THOMAS W. JOHNSTON
135 South LaSalle Street
Chicago, Illinois 60603

WILLIAM H. ABBOTT
JOHN L. CONNOLLY
2501 Hudson Road
St. Paul, Minnesota 55119

ROBERT Z. HICKMAN
4 North Vermilion Street
Danville, Illinois 61833
Attorneys for Respondent

Of Counsel
CHADWELL, KECK, KAYSER,
RUGGLES & McLAREN
135 South LaSalle Street
Chicago, Illinois 60603

McCORMICK & HENDERSON INC., CHICAGO, ILL.

INDEX

	PAGE
Previous Opinions	1
Question Presented	2
Rules and Statutes Involved	2
Counterstatement	3
Reasons for Not Granting Certiorari	5
I. A Writ of Mandamus Directing Transfer Was Not Barred By This Court's Earlier Decision	5
II. Proceedings In The Trial Court Demonstrate A Clear Abuse of Discretion	10
Conclusion	15

CITATIONS

Cases

Aguilar v. Texas, 387 U.S. 108 (1964)	12
Bowles v. Simon, 145 F.2d 334 (7th Cir. 1944)	10n
Bryan v. United States, 338 U.S. 552 (1950)	8n
Chicago R.I. & Pac. R.R. Co. v. Igoe, 220 F.2d 299 (7th Cir.), *cert. denied,* 350 U.S. 822 (1955)	12
Dixie Cup Co. v. Paper Container Mfg. Co., 174 F.2d 834 (7th Cir.), *cert. denied,* 338 U.S. 867 (1949)	9n
Helvering v. Wood, 309 U.S. 344 (1940)	5n
LaBuy v. Howes Leather Co., 352 U.S. 249 (1957)	6, 7, 10, 12, 13
Los Angeles Brush Mfg. Corp. v. James, 272 U.S. 701 (1927)	7n

PAGE

McCullough v. Cosgrave, 309 U.S. 634 (1940) 7n

Minnesota Mining & Manufacturing Co. v. Platt, 345 F.2d 681 (7th Cir. 1965) 2

Minnesota Mining & Manufacturing Co. v. Platt, 314 F.2d 369 (7th Cir. 1963) 2, 3, 5, 14

Platt v. Minnesota Mining & Manufacturing Co., 376 U.S. 240 (1964) 2, 3, 9n, 13, 15

Schlagenhauf v. Holder, 379 U.S. 104 (1964) 7, 10, 12n

Union Tool Co. v. Wilson, 259 U.S. 107 (1922) 10n

United States v. American Natural Gas Co., 1959 Trade Cas. ¶ 69,265 (E.D. Wis. 1959) 14n

United States v. Cores, 356 U.S. 405 (1958) 9

United States v. E. I. duPont deNemours & Co., 83 F. Supp. 233 (D.D.C. 1949) 8n

United States v. Erie Basin Metal Prods. Co., 79 F. Supp. 880 (D. Md. 1948) 9n

United States v. General Motors Corp., 194 F. Supp. 754 (S.D.N.Y. 1961) 9n, 14n

United States v. Igoe, 331 F.2d 766 (7th Cir. 1964), *cert. denied,* 380 U.S. 942 (1965) 7n

United States v. National City Lines, Inc., 7 F.R.D. 393 (S.D. Cal. 1947) 9n, 14n

United States v. North American Van Lines, Inc., 1962 Trade Cas. ¶ 70,283 (D.D.C. 1962) 9n, 14n

TEXTS

Federal Rules of Criminal Procedure, N.Y. University School of Law Institute, Proceedings, Vol. VI (1946) 9n

PAGE

Rules and Statutes

Rule 2 of the Federal Rules of Criminal Procedure 14

Rule 21(b) of the Federal Rules of Criminal Procedure 2, 4, 5, 6, 8, 8n, 9, 10, 12, 12n, 13

Rule 29(a) of the Federal Rules of Criminal Procedure 8n

Rule 35 of the Federal Rules of Civil Procedure 12n

28 U.S.C. § 453 13

28 U.S.C. § 1404 8

28 U.S.C. § 1651(a), All Writs Act 2, 7

28 U.S.C. § 2106 .....2, 7, 7n, 8n

In the Supreme Court of the United States

OCTOBER TERM, 1965

No. 274

THE HONORABLE CASPER PLATT, CHIEF JUDGE, UNITED STATES DISTRICT COURT, EASTERN DISTRICT OF ILLINOIS,
Petitioner,

v.

MINNESOTA MINING AND MANUFACTURING COMPANY,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

BRIEF OF MINNESOTA MINING AND MANUFACTURING COMPANY IN OPPOSITION

PREVIOUS OPINIONS

Petitioner's[1] original Memorandum and Order denying defendant's motion to transfer is reported unofficially in

[1] Throughout this brief, Judge Platt is referred to as "petitioner"; Minnesota Mining and Manufacturing Company as "defendant"; the petition for writ of certiorari and appendices thereto are cited "Pet. ....."; and the printed appendix of Minnesota Mining and Manufacturing Company in the Court of Appeals (copies of which are filed herewith) is cited as "R. ....."

1962 Trade Cases ¶ 70,455 (E.D. Ill. 1962) and is reprinted here (Pet. 36-46 and R. 8-18). The decision of the Court of Appeals vacating the original order is reported at 314 F.2d 369 (7th Cir. 1963) (R. 19-36). The decision of this Court ordering remand to the district court is reported at 376 U.S. 240 (1964) (R. 37-43). Petitioner's second Order denying transfer is not reported (Pet. 34-35 and R. 6-7). The second opinion of the Court of Appeals is reported at 345 F.2d 681 (7th Cir. 1965) (Pet. 15-33).

QUESTION PRESENTED

Whether the issuance of a writ of mandamus by the Court of Appeals to correct a clear abuse of discretion by the trial court was in disregard of the prior decision of this Court.

RULES AND STATUTES INVOLVED

In addition to Rule 21(b) of the Federal Rules of Criminal Procedure (Pet. 2) the following statutory provisions are involved:

All Writs Act, 28 U.S.C. § 1651(a) which provides:

> "The Supreme Court and all courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law."

28 U.S.C. § 2106 which provides:

> "The Supreme Court or any other court of appellate jurisdiction may affirm, modify, vacate, set aside or reverse any judgment, decree, or order of a court lawfully brought before it for review, and may remand the cause and direct the entry of such appropriate judgment, decree, or order, or require such further proceedings to be had as may be just under the circumstances."

COUNTERSTATEMENT

This counterstatement is limited to a brief analysis of what happened on remand.[2] The relevant facts underlying the motion to transfer are set forth in the footnotes to the opinions of the Court of Appeals (Pet. 17-21 n. 3; 314 F. 2d 369, 375 n. 3 (R. 29-30)).

In accordance with this Court's earlier opinion, *Platt* v. *Minnesota Mining & Manufacturing Co.*, 376 U.S. 240, 246 (1964) (R. 37-42), the Court of Appeals vacated petitioner's order denying transfer, and remanded the case to him

> "for reconsideration . . . of the motion of . . . defendant . . . for transfer to the . . . District of Minnesota, without reference to the ability of the United States to receive a fair and impartial trial in Minnesota" (R. 44).

The decision of this Court and the mandate of the Court of Appeals obviously contemplated a reconsideration of the record (which is completely documentary) without reference to the improper criteria previously considered. A number of circumstances make it abundantly clear, however, that petitioner failed and refused to reconsider defendant's motion as directed.

Petitioner failed to give proper consideration to the undisputed record facts. His attitude in reconsidering the motion is reflected in his remarks at the outset of the rehearing when he actually suggested that the mandate of

---

[2] Defendant does not accept the petition's description or interpretation of the previous decisions in this case (Pet. 3-8) and its analysis of these decisions is included in Sections I and II, *infra*.

the Court of Appeals "evidently puts it [the motion] back in my lap without any affidavits or anything else" (R. 254). And there is nothing stated in his opinion on remand (R. 6) indicating a review of the original affidavits and record which overwhelmingly favored transfer. Moreover, petitioner's answer to the second rule to show cause, insofar as it attempts to set forth a factual basis for denying transfer, is in all material respects a verbatim copy of the answer submitted in the original mandamus proceedings, omitting only the remarks concerning the "fair trial" issue. (*Compare* Pet. 31-33 *with* R. 181-83).

Petitioner's failure to give full effect to the mandate is perhaps explained by the resentment he displayed on rehearing toward the Court of Appeals' first decision which he said was "reversed now," "deliberately refused to give me any discretion," "made remarks that were wholly uncalled for" and which showed "that they had an antagonistic attitude towards . . . [my] decision" (R. 286-88).

Under these extraordinary circumstances which were accompanied by an undisputed record requiring transfer, the Court of Appeals came to the inevitable conclusion that petitioner, in refusing transfer, abused his discretion and that "this case is one in which the correction of that abuse"—by the issuance of a writ directing transfer—"would serve to give effect to rule 21(b) and is particularly appropriate for the exercise of mandamus" (Pet. 24).

REASONS FOR NOT GRANTING CERTIORARI

I.

A Writ of Mandamus Directing Transfer Was Not Barred By This Court's Earlier Decision

The petition does not contend that this case is important in terms of the public interest[3] or that petitioner was right in denying defendant's transfer motion.[4] Instead, the petitioner argues that under this Court's earlier decision, the Court of Appeals, in a mandamus proceeding to review a refusal to transfer under Criminal Rule 21(b), "is limited to determining the propriety of the criteria used . . . in considering the transfer motion," and even if the district judge "applied improper criteria," the Court of Appeals can do no more than "remand to the district court" (Pet. 9, 10).

---

[3] In fact, the petition implies the absence of any substantial public question by attempting to reserve the right to argue, should certiorari be granted, "the broader question whether mandamus was" "an appropriate means of review of transfer orders" (Pet. 8 n. 5, 2 n. 1). But petitioner expressly waived any right to raise this question when he conceded in the Court of Appeals "the validity . . . for purposes of this proceeding" of using "the extraordinary writ of mandamus as an appropriate means of reviewing decisions on a Rule 21(b) transfer motion." (Brief in Support of Answer to Rule to Show Cause 19 n. 7). Under these circumstances, the footnoted question may not now be raised since "to open here for the first time and in face of the express disclaimer an inquiry into the broader field is not only to deprive this Court of the assistance of a decision below but to permit a shift to ground which the . . . [respondent] had every reason to think was abandoned in the earlier stages of this litigation." *Helvering* v. *Wood*, 309 U.S. 344, 349 (1940).

[4] Nor in his two dissents did Chief Judge Hastings ever state that petitioner's refusal to transfer was a correct decision. Pet. 25-30; 314 F.2d at 375-78 (R. 30-36).

If this theory were valid, a court of appeals would be powerless to correct the grossest abuse of discretion in any criminal case involving transfer motions. There would be no end to litigation of this kind no matter how persistent and clear the abuse by the district court. Under this theory, even if on remand the district court had again denied transfer for the same concededly improper reason—the alleged difficulty of obtaining a fair trial in Minnesota—the Court of Appeals still could not have directed transfer. Nothing in this Court's earlier opinion even suggests an intention to promulgate a rule with such startling implications. That opinion simply held that the writ of mandamus directing transfer then was improper because it deprived the trial judge of the initial opportunity to decide a Rule 21(b) transfer motion in light of *only* proper criteria. Since petitioner initially had considered a concededly inappropriate factor, this Court said that the Court of Appeals, instead of directing transfer at that time, should only have determined the "appropriate criteria" and left their "application to the trial judge on remand." 376 U.S. at 245 (R. 41).

The opinion, however, did not purport to circumscribe the "supervisory control of the District Courts by the Court of Appeals . . .," *LaBuy* v. *Howes Leather Co.*, 352 U.S. 249, 259 (1957), or to limit the scope of review or nature of relief that could be granted *under different circumstances* such as where the trial judge clearly abuses his discretion in the *application* of proper criteria. When the Court of Appeals issued its second writ directing transfer—the one now challenged—the circumstances were entirely different from those in the earlier mandamus proceeding. Petitioner had been given a second opportunity to consider defendant's 21(b) motion in light of proper criteria. However, instead of properly exercising his

discretion, he has now for a second time clearly abused his discretion and an order directing transfer is necessary as an effective remedy.

Furthermore, the inflexible rule urged by petitioner directly conflicts with decisions and statements of this Court, after as well as before its decision in this case, that "the writ is appropriately issued . . . when there is . . . clear abuse of discretion," and its "issuance . . . is itself generally a matter of discretion," *Schlagenhauf* v. *Holder*, 379 U.S. 104, 110, 111-12 n. 8 (1964); and that mandamus lies to correct "an abuse of the petitioner's [district court's] power" particularly ". . . '[W]here the subject concerns the enforcement of the . . . [r]ules which by law it is the duty of this Court to formulate and put in force' . . ." *LaBuy* v. *Howes Leather Co.*, 352 U.S. at 256.[5]

The Court of Appeals' discretionary *power* to issue a writ of mandamus directing entry of a transfer order is implicit in the All Writs Act, 28 U.S.C. § 1651(a) and is made explicit in 28 U.S.C. § 2106[6] which provides a broad grant of power to the appellate courts and clearly authorizes the Court of Appeals to enter an order which, in the

---

[5] See also, *McCullough* v. *Cosgrave*, 309 U.S. 634 (1940); *Los Angeles Brush Mfg. Corp.* v. *James*, 272 U.S. 701, 706 (1927); *United States* v. *Igoe*, 331 F.2d 766, 768 (7th Cir. 1964), *cert. denied*, 380 U.S. 942 (1965).

[6] Pertinent portions of 28 U.S.C. § 2106 provide: "The Supreme Court or any other court of appellate jurisdiction may . . . vacate . . . any . . . order of a court lawfully brought before it for review, and may . . . direct the entry of such appropriate . . . order . . . as may be just under the circumstances."

interest of justice, is required to effectuate a right the district court wrongfully refuses to acknowledge.[7] Coupled with the remedial powers of the mandamus writ, this statute affords the courts of appeals an operative mechanism for insuring that the federal trial courts comply with the procedural rules promulgated by this Court.

This Court's prior decision was certainly not intended to repeal Criminal Rule 21(b) or to thwart its announced purposes and plain language that a criminal case "*shall*" be transferred if in the interest of justice in contrast to the permissive "may" be transferred in 28 U.S.C. § 1404, the civil transfer statute. The purpose of the Rule, to provide "that the defendants would have some rights in . . . [the selection of the place of trial]"[8] was to prevent the previously permitted arbitrary and capricious action by the prosecution, particularly in multi-venue antitrust cases, of selecting a forum with little or no connection with the litigation and far removed from the "records, officers,

---

[7] Criminal Rule 21(b) does not limit the power of a court of appeals under § 2106. In *Bryan* v. *United States*, 338 U.S. 552, 559 (1950) this Court held that when a district court has not properly applied a Criminal Rule (Rule 29(a) in that case) "that is an error of law for which the Court of Appeals may reverse and remand. But when the Court of Appeals remands, [the] Rule . . . does not control its directions to the District Court. The Court of Appeals must look to . . . § 2106 for guidance as to the kind of order which it may direct the District Court to enter."

[8] *United States* v. *E. I. duPont deNemours & Co.*, 83 F. Supp. 233, 234 (D.D.C. 1949).

personnel and counsel'"[9] of the defendant.[10] Yet petitioner here implies that this Court's remarks in its opinion concerning the "discretionary function" of the "trial judge" give him capricious and arbitrary power to determine transfer motions devoid of any legal or judicial limits and without regard to any applicable standards. This Court's previous opinion specifically did not change the applicable standards or criteria of Rule 21(b) "assuming, without deciding . . . [the] validity for the purposes of this case" of the nine factors which both parties and the Court of Appeals agreed were "appropriate" 376 U.S. at 244 (R. 40). If Rule 21(b) is to continue to be a "valuable tool of justice" *United States* v. *Cores*, 356 U.S. 405, 410 (1958), the courts of appeals must insure that district courts apply the proper standards within the bounds of *judicial discretion.* Such discretion is "impartial reasoning, guided and controlled in its exercise by fixed legal principles" and is "the opposite of caprice and arbitrary action."[11]

---

[9] *Platt* v. *Minnesota Mining & Mfg. Co.*, 376 U.S. at 246 (R. 42).

[10] This practice of indicting in distant districts has been characterized by a member of the Advisory Committee on the Criminal Rules as "pretty shabby business for the great government of the United States to indulge in" and a primary purpose of Rule 21(b) was to prevent this practice. Federal Rules of Criminal Procedure, N.Y. University School of Law Institute, Proceedings, Vol. VI, 168-170, 224-225, 274-275 (1946). Accord: *United States* v. *North American Van Lines, Inc.*, 1962 Trade Cas. ¶ 70,283 (D.D.C. 1962); *United States* v. *General Motors Corp.*, 194 F.Supp. 754, 757 (S.D. N.Y. 1961); *United States* v. *Erie Basin Metal Prods. Co.*, 79 F. Supp. 880, 885 (D.Md. 1948); *United States* v. *National City Lines, Inc.*, 7 F.R.D. 393, 395-398 (S.D. Cal. 1947).

[11] *Dixie Cup Co.* v. *Paper Container Mfg. Co.*, 174 F.2d 834, 836 (7th Cir.), *cert. denied*, 338 U.S. 867 (1949).

The Court of Appeals has not disregarded this Court's opinion; on the contrary, its actions have been consistent with the opinion, the letter and spirit of Criminal Rule 21(b), and the limited use of mandamus as an extraordinary remedy for ". . . the enforcement of the . . . Rules." *LaBuy* v. *Howes Leather Co.*, 352 U.S. at 256; *Schlagenhauf* v. *Holder*, 379 U.S. at 112.

II.

Proceedings In The Trial Court Demonstrate A Clear Abuse of Discretion

The petition candidly and necessarily concedes that the record in this case would support "a decision in favor of transfer" (Pet. 13). The Court of Appeals has summarized (Pet. 17-21 n.3) the defendant's detailed and undisputed factual showing[12] that the Minnesota district rather than the Eastern District of Illinois is the just and proper place of trial with respect to all the agreed criteria of the interest of justice: location of parties and records, events in issue, contact between defense counsel and de-

---

[12] It is noted (Pet. 7 n. 4) with apparent cynicism that the Court of Appeals relied upon defendant's brief for the factual recitation in its opinion, but nowhere does the petition or the dissenting opinion challenge even a single one of the facts there recited. Indeed, as the Court of Appeals pointed out: "neither at the original hearing in the district court, nor upon remand, did the government offer any evidence to refute the foregoing facts" (Pet. 18). This statement is likewise unchallenged in the petition, and the facts are undisputed. Hence, there is no issue of *de novo* determination by the Court of Appeals. Rather, the question is whether there has been a refusal to apply, or a misapplication of, established principles of law to undisputed or conceded facts, each of which has been held to be an abuse of discretion. *Union Tool Co.* v. *Wilson*, 259 U.S. 107, 112 (1922); *Bowles* v. *Simon*, 145 F.2d 334, 337 (7th Cir. 1944).

fendant's executives, disruption of business, unjustifiable expense, convenience of witnesses, and docket conditions.

In sharp contrast to this undisputed factual showing is the absence of any showing of justification for trial in the Illinois district. For example, despite defendant's repeated attempts to obtain from the government any factual basis for trial in Danville (R. 70, 80, 87), *the record is still devoid of any competent evidence locating a single government or defense witness—not one—in the entire Eastern District of Illinois.* This is in the face of defendant's undisputed evidence disclosing the existence and specific location of 99 potential government witnesses and the greater ease and facility by which such witnesses could reach Minnesota for trial, as compared to the inconvenience of Danville (R. 184-87, 204-05). This evidence was totally ignored in favor of a general affidavit of government counsel that asserted the cloak of grand jury secrecy as an excuse for the government's failure to offer facts even as to location, let alone names or other identification, of witnesses (R. 143, 195).[13] The determination of the interest of justice from specific *facts* submitted by the

---

[13] Government counsel attempted to explain away examples of instances where disclosure of both identity and location of prospective government witnesses was made by the Antitrust Division in opposition to transfer motions (R. 206-207, 210-250) as "mistakes" (R. 277). Petitioner, himself, in his *initial* decision confessed that Minneapolis-St. Paul would be "more convenient" for defense witnesses and that "as to other witnesses the question of convenience is not so easily determined." (Pet. 40). Yet in his second decision, he insists that "due credence" be given to the conclusions and opinions of government counsel's affidavit concerning this question—an affidavit in the same language quoted in *his* initial decision and from which he said he could not determine the question (Pet. 35; R. 143, 195).

parties is the judicial function under Rule 21(b).[14] The trial court's willingness here to give "credence" to government counsel's conclusory affidavit was a delegation of the judicial function to counsel for the prosecution. See *Aguilar* v. *Texas*, 378 U.S. 108, 111-15 (1964). A result based on such complete abdication of judicial discretion is clearly amenable to the Court of Appeals' power of mandamus. *LaBuy* v. *Howes Leather Co.*, 352 U.S. at 256.

Likewise, analysis of the answer to the rule to show cause destroys every other asserted justification for trial in Danville (Pet. 30-33). Petitioner's concern for an early trial, also available in the transferee district (R. 208-209), stemmed from acceptance of government counsel's judgment of defendant's guilt and its effect on defendant's competitors (Pet. 31). The increase in government expense is completely conjectural without any record basis other than conclusory oral allegations (R. 278; Pet. 32). Transportation of the grand jury documents to Minnesota would cost only $50 (R. 13, 125-26). No record support for denial of the transfer motion having been shown, and in the face of uncontradicted evidence requiring transfer, refusal to enter the appropriate transfer order necessitated the use of the extraordinary writ directing transfer. *Chicago R.I. & Pac. R.R. Co.* v. *Igoe*, 220 F.2d 299, 304 (7th Cir.), *cert. denied*, 350 U.S. 822 (1955).

---

[14] Just as the "good cause" requirement of Civil Rule 35 requires "discriminating application by the trial judge," and is not satisfied "by mere conclusory allegations," *Schlagenhauf* v. *Holder*, 379 U.S. 104, 118 (1964), so too the "interest of justice" requirement of Criminal Rule 21(b) must require the district court to make a discriminating application of the relevant criteria to the record *facts*.

Petitioner further abused his discretion by brushing aside expense and inconvenience criteria previously prescribed by the Court of Appeals and unchallenged at any stage of these proceedings, and by insisting upon the use of criteria for comparing docket conditions which the Court of Appeals had previously rejected (Pet. 23-24). In these circumstances, it was plainly incumbent upon the Court of Appeals to issue the mandamus writ to prevent usurpation of its "supervisory control of the District Court[s] . . ." which this Court has acknowledged it possesses. *LaBuy* v. *Howes Leather Co.*, 352 U.S. at 259-60.

1. *Unjustified Expense and Inconvenience* — Expense and inconvenience to the parties are factors which this Court considered relevant in determining a Rule 21(b) transfer motion. 376 U.S. at 244, 246 (R. 40, 42). The government argued at the second hearing that the defendant's ability to absorb the undenied additional expense to it of at least $100,000 which a Danville trial would require (Pet. 22 n. 4) was a relevant consideration warranting denial of transfer. In other words, a large successful corporation should be denied a right to which a smaller one would be entitled. Indeed, the petition makes the strange argument that "while the financial strength of the defendant is not an affirmative justification for trial in Illinois, *it is a relevant factor in determining how great a burden trial in that district would be*" (Pet. 11) (emphasis added). In short, if a defendant can survive the expense, let him incur it, no matter how unnecessary.

Only by the adoption of a rule that mocks even the principle of "equal justice under law," 28 U.S.C. § 453, could defendant's undisputed showing of substantial expense, inconvenience and hardship be so minimized and ignored. The petition has cited no authority for the rule

of law now proposed, nor is there any.[15] Rule 2 of the Federal Rules of Criminal Procedure dictates that those rules are to be construed to eliminate "unjustifiable expense," yet the construction urged upon and adopted by petitioner defies that dictate.

The Court of Appeals correctly observed that petitioner's statement that ". . . interruption of the business and expense of defendant have been overemphasized" (Pet. 35; R. 7) indicates "something less than a fair consideration of salient parts of . . . [defendant's] case on remand" (Pet. 23). Faced with such bases for denial of transfer, the Court of Appeals was forced to conclude that the only appropriate remedy for the abuse of discretion was a direct order to transfer.

2. *Docket Conditions* — In its first opinion in this case, the Court of Appeals set forth the standard for properly evaluating the comparative status of the dockets in the two forums — the average case load in the district per judge. 314 F. 2d at 375 n. 3 (R. 30). However, in defiance of this standard which again, upon remand, showed the average case load to be slightly less in Minnesota than in the Eastern District of Illinois (R. 209), petitioner himself presented evidence at the rehearing which considered only Danville instead of all of the Eastern District (R. 254-255). Petitioner's deliberate refusal to apply properly a

---

[15] District court opinions holding that size and wealth of a corporation cannot be used to justify denial of a transfer motion include *United States* v. *North American Van Lines, Inc.*, 1962 Trade Cas. ¶ 70,283 (D.D.C. 1962); *United States* v. *General Motors Corp.*, 194 F. Supp. 754, 756 (S.D.N.Y. 1961); *United States* v. *American Natural Gas Co.*, 1959 Trade Cas. ¶ 69,265 (E.D. Wis. 1959); and *United States* v. *National City Lines, Inc.*, 7 F.R.D. 393, 398, 402-03 (S.D. Cal. 1947).

factor formulated by the Court of Appeals in full accordance with its function of determining "appropriate criteria," as specified by the Supreme Court, 376 U.S. at 245 (R. 41), is the kind of judicial abuse which is likewise amenable to correction by mandamus directing transfer.

CONCLUSION.

Petitioner has been afforded the opportunity to reconsider defendant's transfer motion in the light of the appropriate and proper criteria of the interest of justice determined by the Court of Appeals. However, his actions on remand have convinced the Court of Appeals that he flouted and defied its mandate, misapplied and refused to apply the relevant criteria, refused to transfer this case in the face of an undisputed record which overwhelmingly required it, and for all these reasons clearly abused his discretion in applying the rules formulated by the Supreme Court; thus this case is particularly appropriate for issuance of a writ of mandamus directing entry of an order of transfer.

For the reasons stated herein, it is respectfully urged that the petition for writ of certiorari be denied.

Respectfully submitted,

JOHN T. CHADWELL
GLENN W. McGEE
ALLAN J. RENICHE
THOMAS W. JOHNSTON
135 South LaSalle Street
Chicago, Illinois 60603
WILLIAM H. ABBOTT
JOHN L. CONNOLLY
2501 Hudson Road
St. Paul, Minnesota 55119
ROBERT Z. HICKMAN
4 North Vermilion Street
Danville, Illinois
Attorneys for Respondent

Of Counsel:
CHADWELL, KECK, KAYSER,
RUGGLES & McLAREN
135 South LaSalle Street
Chicago, Illinois 60603

September 1965

In the Supreme Court of the United States

OCTOBER TERM, 1965

No. 274

THE HONORABLE CASPER PLATT, CHIEF JUDGE, UNITED STATES DISTRICT COURT, EASTERN DISTRICT OF ILLINOIS, PETITIONER

v.

MINNESOTA MINING AND MANUFACTURING COMPANY

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

MEMORANDUM SUGGESTING MOOTNESS

The petition for a writ of certiorari in this case, filed on June 18, 1965, sought review of an order of the Court of Appeals for the Seventh Circuit directing that a writ of mandamus issue requiring Judge Platt to transfer a criminal antitrust case for trial from the United States District Court for the Eastern District of Illinois to the District Court for the District of Minnesota.

On September 16, 1965, after the respondent filed its brief in opposition, Judge Platt died.

The criminal case was terminated on January 5, 1966, when another judge of the District Court for the

799-213—66

Eastern District of Illinois (Judge Juergens) accepted respondent's pleas of *nolo contendere* to five counts of the indictment (to which the government did not object), imposed a $190,000 fine upon the respondent, and, on the government's motion, dismissed the remaining four counts. In view of this disposition of the case, any issue as to the proper district for its trial is moot. Accordingly, the Court should grant the petition for a writ of certiorari, vacate the judgment of the court of appeals, and remand the case to that court with instructions to dismiss the mandamus proceeding as moot. See *United States* v. *Munsingwear, Inc.*, 340 U.S. 36, 39–41. In the circumstances, there is no occasion for the Court to consider what the effect of Judge Platt's death would be upon the continued maintenance of the mandamus proceeding.

Respectfully submitted.

THURGOOD MARSHALL,
Solicitor General.

JANUARY 1966.

U.S. GOVERNMENT PRINTING OFFICE: 1966

LIBRARY
SUPREME COURT, U. S.

No. 274

Office-Supreme Court, U.S.
FILED
JAN 20 1966
JOHN F. DAVIS, CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1965

THE HONORABLE CASPER PLATT, CHIEF JUDGE, UNITED STATES DISTRICT COURT EASTERN DISTRICT OF ILLINOIS,

Petitioner,

v.

MINNESOTA MINING AND MANUFACTURING COMPANY,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

ANSWER OF MINNESOTA MINING AND MANUFACTURING COMPANY TO THE SOLICITOR GENERAL'S MEMORANDUM SUGGESTING MOOTNESS

JOHN T. CHADWELL
GLENN W. McGEE
ALLAN J. RENICHE
THOMAS W. JOHNSTON
135 South LaSalle Street
Chicago, Illinois 60603

WILLIAM H. ABBOTT
JOHN L. CONNOLLY
2501 Hudson Road
St. Paul, Minnesota 55119

ROBERT Z. HICKMAN
4 North Vermilion Street
Danville, Illinois 61833
Attorneys for Respondent

Of Counsel:
CHADWELL, KECK, KAYSER, RUGGLES & McLAREN
135 South LaSalle Street
Chicago, Illinois 60603

McCORMICK AND HENDERSON, INC., CHICAGO

In the
Supreme Court of the United States

OCTOBER TERM, 1965

THE HONORABLE CASPER PLATT, CHIEF JUDGE, UNITED STATES DISTRICT COURT, EASTERN DISTRICT OF ILLINOIS,

Petitioner,

v.

MINNESOTA MINING AND MANUFACTURING COMPANY,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

---

ANSWER OF MINNESOTA MINING AND MANUFACTURING COMPANY TO THE SOLICITOR GENERAL'S MEMORANDUM SUGGESTING MOOTNESS

The memorandum suggesting mootness filed by the Solicitor General on January 17, 1966, accurately recites the facts of the death of the petitioner on September 16, 1965, and the final disposition on January 5, 1966 of the criminal case, the transfer of which was the subject matter of the mandamus proceeding. In view of these facts, the respondent concurs in the suggestion of the Solicitor General in said memorandum that the Court should grant the petition for a writ of certiorari, vacate the judgment of the court of appeals, and remand the case to that court

with instructions to dismiss the mandamus proceeding as moot.

Respectfully submitted,

JOHN T. CHADWELL
GLENN W. McGEE
ALLAN J. RENICHE
THOMAS W. JOHNSTON
135 South LaSalle Street
Chicago, Illinois 60603

WILLIAM H. ABBOTT
JOHN L. CONNOLLY
2501 Hudson Road
St. Paul, Minnesota 55119

ROBERT Z. HICKMAN
4 North Vermilion Street
Danville, Illinois 61833
Attorneys for Respondent

Of Counsel:
CHADWELL, KECK, KAYSER,
RUGGLES & McLAREN
135 South LaSalle Street
Chicago, Illinois 60603
January 1966